

10 IB16  
Atty Gen. Op. No. \_\_\_\_\_

JOSEPH R. BIDEN, III  
ATTORNEY GENERAL

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December 15, 2010

Patrick J. Cahill  
555 Kates Way  
Smyrna, DE 19977

RE: Freedom of Information Act Complaint  
Against Town of Smyrna

Dear Mr. Cahill :

On November 10, 2010, the Delaware Department of Justice ("DDOJ") received your complaint that the Town of Smyrna ("the Town") violated the Freedom of Information Act ("FOIA") and the Town Charter.<sup>1</sup> On the same day that we received your complaint, the DDOJ forwarded your letter to the Town, asking it to address only two issues in your complaint: whether the Town violated FOIA by not having public meetings of the committee charged with selecting a police chief, and whether applications for the position of police chief are public records under FOIA. We received the Town's response on November 16, 2010. We then asked the Town to address whether the Council has been having email discussions that violate FOIA. We received that response on December 7, 2010. This is the DDOJ's determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

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<sup>1</sup> The DDOJ has no authority under the Freedom of Information Act to determine whether the Charter has been violated, and therefore we will not address those allegations here.

### **RELEVANT FACTS**

While FOIA requires that a complaint to the Attorney General only has to “set forth briefly the nature of the alleged violation,” 29 *Del. C.* § 10005(e), a complaint must provide facts that, if true, would prove a violation, and that the facts alleged must be specific enough to permit the public body to formulate a response. *Op. Att’y Gen. 96-IB05*, 1996 WL 114716 (Del. A.G. Feb. 13, 1996). Most of what you have asserted is not factually specific enough for us to determine that a violation has occurred or for the Town to prepare a response. For example, although you claim that a majority of the Town Council has “engaged in a pattern of behavior that indicates that they will continue to violate FOIA in the future,” you point to past conduct that you do not describe other than to say that in ending the employment of town employees “they violated FOIA several times [and] the council has since violated FOIA on a wholesale basis.”

The only facts that present a possible violation that the Town can address are your allegations that 1) a committee of the Town Council—formed to handle the hiring of a new chief of police—has engaged in meetings or informal decision-making outside of the public’s view, that 2) they “routinely” discuss town business by email, and “come[] to decisions during these discussions on how they are going to vote,” including on the selection of the police chief and on the date for Halloween trick-or-treating, and that 3) the committee intends not to release the police chief applications to the public.<sup>2</sup>

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<sup>2</sup> Whether the committee destroys any applications or refuses to allow other Council members to see them is not within the purview of FOIA.

The Town has conceded that the three-member "Personnel Subcommittee" to select a police chief did violate FOIA in:

1. not posting notice, including the agenda, for subcommittee meetings;
2. not meeting in public session before moving into executive session;
3. not returning to public session before adjourning;
4. not keeping meeting minutes.

In order to remedy its violations, the Personnel Subcommittee scheduled a properly noticed meeting for November 19, 2010, to reconsider the police chief applications. Although the Town indicated in its initial response to your complaint that the Personnel Subcommittee will "convene in open session, properly move into executive session, and return to open session prior to any vote or decision making," it appears from the minutes of that re-scheduled meeting that the Subcommittee may not have formally returned to open session before voting.

As to informal or email discussions among council members, the Town has identified two scenarios that do occur. In the first scenario, individual council members who are exchanging emails on matters of public business sometimes copy their exchanges to all council members; however, the copied members do not respond. In the second situation, a quorum of Council has exchanged emails on matters of public business.

#### **RELEVANT STATUTES**

"Every meeting of all public bodies shall be open to the public except those closed [for a permitted reason]." 29 Del. C. § 10004(a). "Public body" includes any

subcommittee of a public body that is supported by public funds, spends public funds or is charged with making "reports, investigations or recommendations" to a public body.

29 *Del. C.* § 10002(c). A public body must vote at a public meeting to move into executive session, and "all voting on public business must take place at a public meeting and the results of the vote made public." 29 *Del. C.* § 10004(c). Sections 10004(e) and (f) of Title 29 set out the requirements for meeting notices, agendas and minutes.

"All public records shall be open to inspection and copying by any [person]. . . ."  
29 *Del. C.* § 10003(a). However, records "specifically exempted from public disclosure by state or common law" are not public records. 29 *Del. C.* § 10002(g)(6).

### **DISCUSSION**

The Town now recognizes that the Personnel Subcommittee is a public body, subject to FOIA. It attempted to remedy its past violations by reconsidering, according to the requirements of FOIA, its review of police chief applications, although it failed to formally return to public session for voting. However, in this case the violation was strictly technical, as there were no members of the public present for the public session.<sup>3</sup> There is no need for this office to order any further remediation.

As to your concern that the Council will not make the police chief applications available to the public, employment applications are not "public records" as defined in FOIA, because they are "specifically exempted from public disclosure by state or

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<sup>3</sup> There is some suggestion in the Town's response that members of the public left the meeting room when the Subcommittee went into executive session. It is not clear whether anyone tried to invite them back into the meeting room when the executive session concluded. That would be the best practice, unless the public body conducts its executive session in another room, and returns to the public meeting room after the executive session.

common law.” 29 *Del. C.* § 10002(g)(6). Delaware recognizes a common law right of privacy which protects an individual from public disclosure of any matter “with which the public has no legitimate concern” or which could “cause mental suffering, shame or humiliation to a person of ordinary sensibility.” *Reardon v. New-Journal Co.*, 164 A.2d 263, 266 (Del. 1960). This office has extended the right of privacy to “records relating to the job qualifications of applicants for public employment[.]” *Op. Att’y Gen. 05-IB20*, 2005 WL 2334348, \*2 (Del. A.G. July 27, 2005).

The emails that were copied to all members of Council did not violate FOIA because the elements of a constructive or serial quorum were not met. FOIA is only violated where there has been “an *active* exchange of thoughts and opinions *and* members were asked to vote or adopt a particular point of view or reach a consensus on what action to take.” *Att’y Gen. Op. 06-IB 16*, 2006 WL 2435111, \*4 (Del. A.G. Aug. 7, 2006) (emphasis added).<sup>4</sup> The Smyrna Council apparently did exchange emails in which a quorum did discuss such matters as how the Council should advertise for the position of Police Chief. Other emails expressed the sender’s opinions as to who should be involved in the selection process and who should have access to the applicants’ submissions. Although we have not asked for or been provided with these emails, the Town assures us that no votes were taken except during properly noticed public meetings.

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<sup>4</sup> Whether asking fellow members of a public body to “adopt a particular point of view” can be prohibited consistent with the First Amendment to the United States Constitution is a question we do not have to address here because it is not raised by the facts presented and may be beyond the scope of our FOIA enforcement powers.

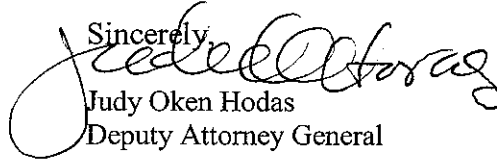
As to the emails concerning the selection of a date for Halloween, apparently the emails were initiated by the Town Clerk to poll the members. It does not appear that there was an email discussion among a quorum of members, although every member was polled. In circumstances similar to those that occurred here, the Court of Chancery held that a series of calls between the President of the Board of Education and the individual Board members did not constitute a serial quorum because the calls were "not a means of circumventing the Freedom of Information Act through serial telephone conversations. Rather, these phone conversations were merely a means [to] informally poll the Board to find out how each member was likely to vote . . . . [I]t is apparent that Dr. Graham's only purpose was to gain a general sense of the Board's position and to determine if they would be ready to vote at the [scheduled meeting] . . . ." *Tryon v. Brandywine Sch. Dist. Bd. of Educ.*, 1990 WL 15719, \*3 (Del. Ch. April 20, 1990).

### **CONCLUSION**

For the reasons stated herein, we find that the Town of Smyrna has violated the Freedom of Information Act concerning the failure of the committee of the Town Council that is handling the hiring of a police chief to give public notice of its meetings or follow any of the FOIA requirements for public bodies. However, that committee has now complied with FOIA in holding its meeting on November 19, 2010, and there is no need to require the Town to take remedial action. The applications for the police chief position are not public records within the meaning of FOIA, there is no FOIA violation in refusing to make those documents available to the public. At no time did a quorum of the Council

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participate by email in an active exchange of ideas with a vote taken or a consensus reached. Therefore, the email exchanges did not violate FOIA.

Sincerely,  
  
Judy Oken Hodas  
Deputy Attorney General

Approved:



Lawrence W. Lewis, State Solicitor

cc: Opinion Coordinator  
John Terence Jaywork, Esquire